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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSE GARCIA MORALES, Defendant and Appellant.	2d Crim. No. B293529 (Super. Ct. No. 2015024737) (Ventura County)

Jose Garcia Morales appeals from the judgment after a jury convicted him of a sexual act with a child 10 years old and under (Pen. Code,[1] § 288.7, subd. (b)). The court sentenced him to 15 years to life in state prison.

Morales contends the trial court erred when it (1) admitted a sexual assault examination report in violation of hearsay rules and the confrontation clause and (2) imposed

[1] Further unspecified statutory references are to the Penal Code.

certain fines and fees without an ability to pay hearing. We affirm.

FACTS

In 2014, Morales lived with his family near six-year-old V.G. and his family. V.G. often played with other kids in the neighborhood and visited their homes, including Morales's home. One day, V.G.'s mother noticed V.G. was acting not "as playful as he usually" did. His mother observed V.G. crying and running away when he saw Morales.

A few days later, V.G. was acting unusual and "a little down," so his mother asked him if there was anything wrong. V.G. said Morales "'licked and sucked'" him in his "'private areas.'" He said it happened three times. He said on one occasion, Morales picked him up from the outside courtyard and brought him inside Morales's bedroom. Morales told him not to tell anyone. V.G.'s mother called the police.

A police officer interviewed V.G. V.G. told the officer that Morales touched and licked his penis three times within the previous three days. After the interview, V.G., his mother, and the officer went to Safe Harbor for a sexual assault examination. Nurse Deanna McCormick conducted the examination, which involved taking oral, scrotal, penile, and anal swab samples from V.G. After she completed the examination, she handed the examination kit to the officer, who then booked it into evidence.

The next day, V.G. and his mother returned to Safe Harbor for an interview with an investigator. The investigator videotaped the interview, which was later presented to the jury. V.G. told the investigator that "every day" Morales tried to pick him up. V.G. described how twice in one day Morales took V.G. to the bedroom, pulled down his pants, and licked his penis.

The following day, an investigator contacted Morales at his home and collected a DNA swab of his cheek. A forensic scientist conducted a DNA analysis of V.G.'s and Morales's swabs. The scientist detected amylase (an enzyme found in saliva) from V.G.'s scrotal, penile, and anal swabs, and she generated a DNA profile consisting of a mixture of two contributors. After deducting V.G.'s DNA, the scientist found Morales was a "possible second contributor" to DNA collected from the scrotal swab. The probability of a DNA sample of a "randomly selected unrelated person" matching with the DNA of the second contributor was 1 in 4.2 sextillion for African Americans, 1 in 1.3 quintillion for Caucasians, and 1 in 53 quadrillion for Hispanics. The scientist also found Morales was a possible second contributor for the DNA collected from the penile swabs with a random match probability of 1 in 7.4 quadrillion for African Americans, 1 in 31 trillion for Caucasians, and 1 in 2.6 trillion for Hispanics.

Trial Evidence

During a jury trial, V.G. testified how "[m]ore than once" Morales pulled down V.G.'s pants and touched V.G.'s penis in the bedroom. He testified a nurse examined his "privates" during a physical examination after the incident.

Regina D'Aquilla, a medical coordinator and sexual assault nurse examiner at Safe Harbor, testified that she was the custodian of records for the facility and that she peer reviews all nurse examiners' reports. D'Aquilla explained that all nurses use a standardized form for their sexual assault examination reports. Once the report is completed, the original report is given to law enforcement, a copy is placed with the examination kit, and another copy is kept in Safe Harbor's records facility.

D'Aquilla testified that McCormick, who was deceased at the time of trial, conducted the examination. D'Aquilla testified the standard protocol for examinations involved conducting a head-to-toe examination, taking photographs, collecting DNA swabs from the patient's genital areas, packaging the swabs and preparing the sexual assault kit, and handing the kit to law enforcement. D'Aquilla reviewed McCormick's sexual assault examination report and testified that nothing in the report indicated protocol was not followed. Based on her review of the report, D'Aquilla testified McCormick took DNA swabs from V.G.'s penis, scrotum, mouth, and anus.

The sexual assault examination report was admitted into evidence under the business records hearsay exception. (Evid. Code, § 1271.) The court redacted any statement V.G. made to McCormick "so [that] there's no confrontation clause issue." The examination report stated that the sexual assault occurred "less than 72 hours" before the examination and that the incidents occurred "multiple times" in the "last 3" days. It noted that the acts happened in the "neighbor[']s home" and the alleged perpetrator was a man in his 40's. The report included a section for V.G.'s and his mother's description of the sexual acts. McCormick placed checkmarks next to descriptions, which indicated that V.G.'s genitals were orally copulated and his anus or genitals were fondled by the perpetrator. The report noted that McCormick conducted a body and head, neck, and oral examination; she reported "no findings." She conducted a genital and anal/rectal examination by "direct visualization" and colposcope; she reported "no findings." The report stated McCormick took three swab samples each from V.G.'s oral, anal, penile, and scrotal areas. The report also stated she took photos

of V.G.'s face and genitals. McCormick printed and signed her name on the form, and she provided her license number. The officer who received the evidence kit also printed and signed his name on the form.

Fines and Fees

At sentencing, the trial court imposed various fines and fees including an $800 sex offense conviction fine (§ 290.3), a $534.48 booking fee (Gov. Code, §§ 29550, 29500.1), a $300 public defender fee (§ 987.8), and a $5,000 restitution fine (§ 1202.4). Morales requested the court waive any "waivable fees" on the ground he did not "have the ability to pay" them. In response, the court waived the cost of the presentence investigation report. Morales said he had no further objection after the court waived the fee.

DISCUSSION

Hearsay/Confrontation Clause

Morales contends the trial court erred when it admitted the sexual assault examination report and D'Aquilla's testimony regarding the contents of the report because the report was inadmissible hearsay and its admission violated the confrontation clause. We disagree.

Hearsay evidence is generally inadmissible if it is "a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Evidence is admissible if it falls within an exception to the hearsay rule. (Evid. Code, § 1200, subd. (b).) An expert cannot relate "case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay

exception." (*People v. Sanchez* (2016) 63 Cal.4th 665, 686 (*Sanchez*).)

Admission of a hearsay statement is also governed by the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." (U.S. Const., 6th Amend.) In *Crawford v. Washington* (2004) 541 U.S. 36, 59 (*Crawford*), the United States Supreme Court held that testimonial hearsay violates the confrontation clause unless the witness is unavailable to testify and the defendant had prior opportunity for cross-examination.

In light of *Crawford* and state hearsay rules, the California Supreme Court in *Sanchez*, *supra*, 63 Cal.4th at page 680, set forth a two-step test to determine the admissibility of an out-of-court statement: (1) we decide whether a statement is hearsay and if a hearsay exception applies; and (2) if the "*Crawford* limitations of unavailability, as well as cross-examination or forfeiture," are not met, we determine whether the statement is testimonial.

Morales does not specify which part of the examination report he is contesting. Much of the report was either redacted or proven through other evidence presented at trial. Several witnesses, including V.G., testified that Morales touched and orally copulated V.G.'s genitals. V.G.'s mother and an officer testified V.G. went to the Safe Harbor two days after the most recent sexual assault occurred, and V.G. testified that a nurse at Safe Harbor examined his "privates." The officer testified he received the examination kit containing the swabs from McCormick after the examination.

In any event, although the entire examination report was hearsay because it contained statements offered for the truth of the matter stated (Evid. Code, § 1200, subd. (a)), it was admissible under the business record hearsay exception. Business records are exempted from the hearsay rule if "made in the regular course of . . . business[,]" "made at or near the time of the act, condition or event[,]" a "custodian . . . testifies to its identity and the mode of its preparation[,]" and the "sources of information and method and time of preparation" indicates its trustworthiness. (Evid. Code, § 1271.) D'Aquilla testified the examination report was made in the regular course of business; it was made two days after the most recent sexual act; D'Aquilla identified the report and explained the standard protocol for a sexual assault examination; and she testified that McCormick followed protocol and that the report was subject to peer review, all of which indicates its trustworthiness. The report therefore did not constitute inadmissible hearsay.

Second, the examination report did not violate Morales's right to confrontation because it was nontestimonial. The California Supreme Court set forth a two-part test to determine whether a statement is testimonial. The statement must have (1) "some degree of formality or solemnity," and (2) a "primary purpose [that] pertains in some fashion to a criminal prosecution." (*People v. Lopez* (2012) 55 Cal.4th 569, 581-582 (*Lopez*); *People v. Leon* (2015) 61 Cal.4th 569, 603; *People v. Dungo* (2012) 55 Cal.4th 608, 619 (*Dungo*); *People v. Holmes* (2012) 212 Cal.App.4th 431, 438 (*Holmes*).) Both criteria must be met before the report will be considered testimonial. (*Holmes*, at p. 438.)

The examination report was nontestimonial because it lacked formality. (*Crawford*, *supra*, 541 U.S. at p. 59.) Several cases have illustrated the "requisite degree of formality or solemnity" to be considered testimonial. (*Lopez*, *supra*, 55 Cal.4th at p. 582.) In *Lopez*, the California Supreme Court held that a nontestifying laboratory analyst's report on the defendant's blood-alcohol level lacked formality. (*Ibid.*) There, the report included a log sheet showing the chain of custody of blood samples and included the analyst's notations, which identified the defendant's blood sample as the one that yielded a blood-alcohol concentration level above the legal limit. (*Id.* at pp. 582-584.) The court observed that those notations were "nothing more than an informal record of data for internal purposes" and that the analyst did not sign, certify, or swear to the truth of the contents of the page. (*Id.* at p. 584.) In *Dungo*, *supra*, 55 Cal.4th at page 619, the California Supreme Court determined that objective observations recorded in an autopsy report lacked the requisite formality. Moreover, in *Holmes*, *supra*, 212 Cal.App.4th at page 438, we held that the forensic analysis relied on by DNA experts was nontestimonial because "unsworn, uncertified records of objective fact" lacked formality.

Here, the sexual assault examination report is nontestimonial because it was not made with the requisite degree of formality or solemnity. Like *Dungo* and *Holmes*, the report consisted of only objective observations and facts. The report consisted of mostly checkmarks on a preprinted form and notations which showed McCormick performed certain tasks according to protocol. Specifically, in the section regarding the DNA swabs, McCormick made numerical notations and checkmarks indicating that she took three DNA swab samples

each from four areas of V.G.'s body. Like *Lopez*, these notations were an "informal record" of DNA collection that did not require her to certify or sign an affidavit swearing to the truth of the information contained in the examination report.

This case is unlike *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 310 (*Melendez-Diaz*), where the United States Supreme Court held that sworn and notarized certificates prepared by a nontestifying laboratory analyst and used to prove that the substance found in plastic bags was cocaine, constituted testimonial hearsay. There, the court observed that the certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' [Citation.]" (*Id.* at pp. 310-311.) This case is also unlike *Bullcoming v. New Mexico* (2011) 564 U.S. 647, 663-665, where the United States Supreme Court held that certificates prepared by a nontestifying laboratory analyst that were "'formalized' in a signed document" and that expressly referred to the court rules providing for its admissibility, were testimonial.

Here, the examination report was not sworn or notarized, nor was there any reference to state evidentiary rules. The report was not the equivalent of "live, in-court testimony" regarding the findings of the sexual assault examination. (*Melendez-Diaz*, *supra*, 557 U.S. at p. 311.) It did not contain McCormick's medical conclusions or analysis of the DNA samples collected. Rather, a forensic scientist, who conducted the DNA analysis of the samples, testified regarding the findings at trial and was subjected to cross-examination. With respect to McCormick's observations during the physical examination, those were irrelevant because she reported "no findings."

In light of our conclusion that the report lacked formality, we need not decide whether the report's primary purpose pertained to criminal prosecution. (See *Holmes*, *supra*, 212 Cal.App.4th at p. 438.) The trial court did not err when it admitted the examination report into evidence because it neither violated hearsay rules or Morales's right of confrontation.

Fines and Fees

Morales contends the $800 sex offense fine (§ 290.3), the $534.48 booking fee (Gov. Code, §§ 29550, 29550.1), and the $300 "public defender" fee (§ 987.8) must be reversed and the $5,000 restitution fine (§ 1202.4) must be stayed because they were imposed without determining his ability to pay them. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1172-1173 (*Dueñas*).) The Attorney General argues Morales forfeited these claims. With the exception of the booking fee, we agree Morales forfeited these claims. (See *People v. Acosta* (2018) 28 Cal.App.5th 701, 705-706 [forfeiture where the defendant did not object to the imposition of § 290.3 fine]; *People v. Aguilar* (2015) 60 Cal.4th 862, 866-867 [forfeiture where the defendant did not object to public defender fees]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [forfeiture where the defendant did not object to a restitution fine above the statutory minimum].)

Here, the trial court was required or allowed to consider Morales's ability to pay before imposing the sex offense conviction fine (§ 290.3, subd. (a)), the public defender fee (§ 987.8, subd. (b)), and the restitution fine, which was set above the minimum amount (§ 1202.4, subds. (c) & (d)). Because Morales did not object to the court's failure to determine his ability to pay these amounts, he forfeited these contentions on appeal. (*People v. McCullough* (2013) 56 Cal.4th 589, 599.)

We reach a different conclusion regarding the booking fee (Gov. Code, §§ 29550, subd. (a), 29550.1). Like the fees in *Dueñas*, *supra*, 30 Cal.App.5th 1157 (court facilities fee [§ 1465.8], criminal conviction assessment [Gov. Code, § 70373], and minimum restitution fine [§ 1202.4]), the booking fee here was mandatory and there are no statutory exceptions based on a defendant's ability to pay. (Gov. Code, § 29550.1 ["Any city . . . whose officer or agent arrests a person is entitled to recover any criminal justice administration fee imposed by a county from the arrested person . . . . A judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person"].) Thus, an objection to the booking fee would have been futile. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 489.)

But remand is unnecessary. The record shows that the trial court considered Morales's ability to pay when it deleted the cost of the presentence investigation report, leaving the $800 sex offense fine, the $300 public defender fee, and the $5,000 restitution fine, all of which totals $6,100. Morales then said he had no further objection. It strains credulity to believe that Morales would have objected to, and that the court would now strike $534.48 in formerly mandatory fees, when the court imposed $6,100 in discretionary fines and fees. (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033.) Remand would be an idle act.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Gilbert A. Romero, Judge

Superior Court County of Ventura

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

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